



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2004

Ms. Kathleen Weisskopf
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2004-4327

Dear Ms. Weisskopf:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202351.

The City of Arlington (the "city") received a request for the personnel files, internal affairs investigations, and other information concerning four named officers. You state that some of the information will be released to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.115, 552.117, 552.119, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample of records.¹

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You claim that the requested information contains an I-9 form and a W-4 form that are excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law.

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the I-9 form in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. Further, employee W-4 forms are confidential under section 6103(a) of title 26 of the United States Code. *See* 26 U.S.C. § 6103(a); *see also* Open Records Decision No. 600 (1992). Accordingly, the city must withhold the Form I-9 and W-4 form under section 552.101 as information made confidential by law.

The requested documents also include information obtained in the course of conducting a polygraph examination. You claim that this information is confidential under section 1703.306 of the Occupations Code. Section 1703.306 provides that "a person for whom a polygraph examination is conducted . . . may not disclose information acquired from a polygraph examination" except to certain categories of people. Because the requestor does not fall within any of the enumerated categories, pursuant to section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code, you must withhold the polygraph information that we have marked.

You also claim that section 411.083 of the Government Code protects a portion of the information.² Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Thus, you must withhold the CHRI from Exhibit 12 that was obtained from DPS under section 552.101 of the Government Code. However, driving record information is not confidential under chapter 411 and must be disclosed. *See* Gov't Code § 411.082(2)(B).

We note that the information at issue contains an accident report that has been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the

²Although you raise section 411.097(c) of the Government Code, from the information provided, we understand you to assert section 411.083.

release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In this instance, the requestor has not provided the city with two of the three pieces of information for the accident report. Therefore, you must withhold the accident report from disclosure under section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

We also note that the documents contain declarations of medical condition and of psychological and emotional health that are required by the Texas Commission on Law Enforcement Officer Standards and Education (the "commission") and that are confidential pursuant to section 1701.306 of the Occupations Code. Section 1701.306 provides as follows:

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

The city must withhold the declarations under section 552.101 of the Government Code in conjunction with section 1701.306 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

This office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (*citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); and personal financial information not relating to a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992) (Employee's Withholding Allowance Certificate; designation of beneficiary of employee's retirement benefits; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history), 523 (1989).

After review of the information at issue, we conclude that although a compilation of a person's criminal history generally implicates that individual's right to privacy, we find that, in this instance, the public has a legitimate interest in the officer's background. *See* Open Records Decision Nos. 562 at 9, n.2 (1990) (public has interest in preserving credibility and effectiveness of police force), 444 (1986) (concluding that public has obvious interest in having access to information concerning qualifications of governmental employees, particularly employees who hold positions as sensitive as those held by members of law enforcement) (information about a public employee's qualifications, disciplinary action and background is not protected by common law privacy), 423 at 2 (1984) (scope of public employee privacy is narrow). *But see United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (concluding that criminal history compilation is generally protected by common law privacy). Accordingly, such information cannot be withheld under common law privacy. Further, we find that the public has a legitimate interest in some of the personal financial information that you seek to withhold from disclosure. Open Records Decision No. 373 at 4 (1983) (determination of whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). Therefore, we have marked the personal financial information that must be withheld pursuant to section 552.101 and common law privacy.

Next, you claim that section 552.115 of the Government Code excepts the submitted birth certificate from disclosure. Section 552.115 provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure. Since section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official, the city may not withhold the birth certificate pursuant to that provision. *See* Open Records Decision No. 338 (1982). Accordingly, the birth certificate cannot be withheld under section 552.115 of the Government Code.

You claim that portions of the documents are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(2) excepts the current and former home address and telephone number, social security number, and the family member information of a peace officer whether the officer made an election under section 552.024

of the Government Code or complies with section 552.1175 of the Government Code. Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Therefore, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

The information at issue also includes a photograph of a peace officer. You claim that section 552.119 of the Government Code excepts this information from disclosure. Section 552.119 provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

(1) the officer is under indictment or charged with an offense by information;

(2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or

(3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

Under section 552.119, a governmental body must demonstrate, if the documents do not demonstrate on their face, that release of the photograph would endanger the life or physical safety of a peace officer. Furthermore, a photograph of a peace officer cannot be withheld under section 552.119 if (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; (3) the photograph is introduced as evidence in a judicial proceeding; or (4) the officer gives written consent to the disclosure.

In this instance, you have not demonstrated, nor is it apparent from our review of the information, that release of the photograph at issue would endanger the life or physical safety of the peace officer depicted. We therefore determine that the city may not withhold the photograph of the peace officer pursuant to section 552.119 of the Government Code.

Finally, you claim that the Texas motor vehicle information contained in the requested documents is excepted under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Therefore, you must withhold the Texas motor vehicle information we have marked under section 552.130 of the Government Code.

In summary, you must withhold the I-9 form and the W-4 form under applicable federal law. You must withhold the polygraph information under section 1703.306 of the Occupations Code. Any criminal history information in Exhibit 12 that was obtained from DPS must be withheld from disclosure under section 411.083 of the Government Code. The accident report must be withheld under section 550.065(b) of the Transportation Code. The declarations of medical condition and of psychological and emotional health are excepted under section 1701.306 of the Occupations Code. We have marked the personal financial information that must be withheld under common law privacy. We have marked the information that must be withheld under sections 552.117(a)(2) and 552.130. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

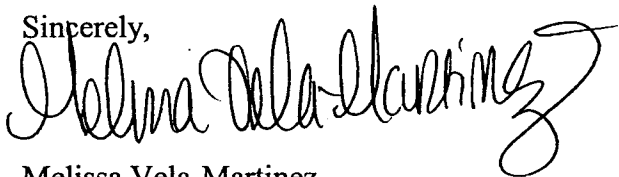
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 202351

Enc. Submitted documents

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(w/o enclosures)